

CIVIL REVISION APPLICATION NO. 1929 OF 1996.

Date of decision: 15.1.1997

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. S. S. Shevde, advocate for the petitioner.

Mr. J. R. Shah, advocate for the respondent.

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Coram: R.R.Jain,J.

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January 15, 1997.

Rule. Mr. J. R. Shah, advocate, waives service of rule.

The petitioner is original defendant against whom Summary Suit No.5286 of 1992 for recovery of Rs.71,156.25 with running interest at the rate of 12% per annum on the principal sum of Rs.55,650.00 was filed by the respondent/original plaintiff in the City Civil Court at Ahmedabad. Summons of the suit was served upon husband of petitioner on 4.1.1993. As the petitioner did not enter appearance within ten days of service, the

respondent/plaintiff moved an application for passing ex-parte decree. The learned Chamber Judge was pleased to pass ex-parte decree in terms of relief claimed, on 2.7.1993. From the record it also transpires that since the petitioner resides in Nasik in Maharashtra State, the decree was transferred to the court at Nasik for execution and Darkhast Proceedings No.172 of 1995 were initiated. The notice of Darkhast was also served upon the petitioner on 9.2.1995. The petitioner entered her appearance and sought several adjournments till 31.3.1995 for filing reply. It is in this background that she filed Civil Misc. Application No.290 of 1995 under Order 37 Rule 4 of Civil Procedure Code for setting aside ex-parte decree. The learned Auxiliary Chamber Judge, upon hearing both the parties and appreciating rival contentions, rejected the application holding that ingredients of Order 37 Rule 4 of Civil Procedure Code are not satisfied consequently the decree cannot be set aside. Aggrieved by this order, the petitioner/original defendant has filed the present revision application.

I have heard the learned advocates and perused the impugned order. It appears that in support of her case, the petitioner has mainly urged following points:

- (i) As the summons was not legally served, she was not knowing about the suit as a result of which could not appear.
- (ii) The petitioner is an illiterate lady from rural area and was unaware about court procedure.

Before dwelling upon the contentions raised, it would be worthwhile to state that decree has been passed in Summary Suit filed under the provisions of Order 37 of Civil Procedure Code. Therefore, even for setting aside such decree, provisions of Order 37 would apply. Rule (1) of Order 37 deal with cases wherein summary suit can be filed. Rule (2) provides rules for institution of summary suit. Rule (3) provides for procedure for appearance of defendant and consequent steps to be taken by plaintiff. Rule (4) deals with power of court to set aside decree and to stay execution depending upon facts and circumstances. It is true that Rule (4) of Order 37 and Rule (13) of Order 9 of Civil Procedure Code deals with same situation and the resultant effect would also be same. But, in my view, both the provisions are not synonymous. While praying for setting aside decree under Rule 4 of Order 37, the aggrieved party has to show special circumstances which prevented from entering appearance within the stipulated period. It cannot be

gainsaid that as provided under Rule 3 in a Summary Suit the defendant is required to enter appearance within ten days of service of summons.

In case of Rule 13 of Order 9 of the Civil Procedure Code, the aggrieved party has only to satisfy court about sufficient cause which prevented him from appearing when the suit was called for hearing. Therefore, whenever a party approaches the court under Rule 4 Order 37 of the Code has to show not only sufficient cause but special circumstances which prevented from entering appearance to defend the suit. The words "special circumstances" used in Rule 4 has some different connotation than "sufficient cause". By "sufficient cause" we mean, a cause sufficient and reasonable to come in way rendering the defendant helpless to approach the court within the stipulated period but "special circumstances" suggest that even by all reasonable efforts and due diligence it was beyond control to enter appearance. In other words, despite best efforts suit could not be defended. Thus, while invoking this rule, the defendant will have to satisfy two conditions, viz., (i) that there was no due service of summons or that he was prevented by sufficient reason from getting leave to defend (ii) that he has a substantial defence to raise in suit and depriving him of defence would result into great prejudice and injustice.

Dealing with first contention, admittedly, the summons was served upon husband of petitioner. Husband is none else but an adult member of defendant's family and both are sharing common bed and roof. In this view of fact, service of summons is legal and valid as provided in Order 5 Rule 15 of the Civil Procedure Code. It is clearly evident from the record that after service of summons upon her husband she wrote a letter dated 7.1.1993 to the plaintiff admitting service of summons and advancing her case in defence. Since service of summons has been admitted the petitioner is now estopped from contending that the summons was not legally served. With such admission, the legality of service of summons upon adult member assumes little importance in the facts and circumstances of this case. It is a settled position of law that once the suit is filed and summons is served upon the defendant, it is for the defendant to appear and defend and be vigilant about progress of the matter. Only inference can be drawn in this case is that the petitioner was careless and negligent having scant regard for court proceedings. Under these circumstances, the contention raised cannot constitute a special circumstance as contemplated under Rule 4 Order 37 of Civil Procedure Code. The conduct of the petitioner

reveals that apart from being special circumstance it is also not a sufficient cause as contemplated under Order 9 Rule 13 of the Civil Procedure Code.

Mr. Shevde has also argued that the petitioner is a rural lady and is unaware about court procedure and provisions of law consequently was prevented from appearing in court. I find no merits in this contention. The petitioner is a lady carrying on business of electronics in a City like Nasik (Maharashtra). City of Nasik cannot be said a rural area. When a lady like petitioner, on receipt of summons, writes letter to the plaintiff ventilating her grievances qua the merits of claim, cannot be branded as a rustic lady coming from urban area having no knowledge about provisions of law and court procedure. In my view, this contention also does not constitute any sufficient cause much less a special circumstance so as to set aside the ex-parte decree passed in Summary Suit.

Harping upon substantial defence, Mr. Shevde has argued that petitioner has to recover Rs.5,800/- from the opponent instead of making payment. In support of his contention, he has relied upon letter dated 7.1.1993 sent by petitioner to the advocate for the respondent. Tenor of letter suggests that the suit transaction is admitted and claiming some adjustments, petitioner claimed Rs.5,800/- But as evident from averments made in para 7 of this petition, the suit transaction is denied i.e., delivery of goods is denied. Thus, the contents of letter are quite contrary to contentions raised in pleadings. Thus, the petitioner does not adhere to one case but goes on changing depending upon the circumstances. This leads to hold that petitioner has not come with clean hands; in other words, has no substantial defence. With the result, I hold that petitioner has no special circumstance to attack the decree.

On appreciation of facts, the learned Judge has rightly come to conclusion that the petitioner has failed to show any special circumstance so as to interfere with the ex-parte decree. The learned Judge has rightly relied upon the observations made by this Court in Civil Revision Application No.411 of 1992 decided on 19.3.1994 (Coram: K.G. Shah, J.) in the case of Nirma Detergent v. M/s. Mohanlal Vinodkumar, wherein much emphasis was put on the existence of special circumstance for setting aside decree under Rule 4 Order 37 of the Civil Procedure Code. In my view, no error of law has been committed by

the court below calling upon this court to exercise jurisdiction under Section 115 of the Civil Procedure Code. In absence of existence of special circumstance the court below had no jurisdiction to set aside the decree.

In the result, the application is devoid of merits and deserves to be dismissed. Order accordingly. Rule is discharged with no order as to costs. Interim relief in force is vacated.

At this stage the learned advocate for the petitioner requests the Court to stay operation of this order to enable the petitioner to approach the Supreme Court. Mr. Shah for the respondent has no objection. Accordingly, operation of this order is stayed for four weeks from today.